IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 50 OF 2005

WITH

CRI. **APPLICATION NO. 5682 OF 2004**

Shri Gorakshnath Khandu Bagal) .. Applicant.
Age:35 Yrs. Occ. Self Employee,
R/at. At Post Manchan, Tal. Ambegaon,)
(Malwadi), Behind Sali Hospital,)
Pune. (At present lodge at Yerawada)
Central Jail, Pune as prisoners)
No. B-33717).)

V/s.

1. State of Maharashtra)

2. Sau Vsishali Gorakshnath Bagal)
Age: 27 Yrs. Occ.: Nil,)
3. Kum. Darshana Gorkshanath Bagal)
Age: 6 Yrs. Occ. Nil.)
(minor represented at Respondent)
No.2, Sau Vaishali Bagal (Mother))
Both R/at Plot No.22, Bora)
Residency, Aund Gaon, Pune.) ..Respondents.

Mrs. Smita R. Kadu- Gawai for the Applicant.

CORAM : S.B.MHASE & D.B.BHOSALE,JJ.
DATED : MARCH 23, 2005

JUDGMENT :- (Per Mhase,J.)

1. This Criminal Revision Application arises from the order passed in PER No. 444/2004, which was filed by the Respondent wife for recovery of arrears of maintenance for a period of 16 months at the rate of

Rs. 1,500/- per month for Respondent No.1 and her daughter Kum. Darshana, in addition to the costs. This PER No. 444/2004 was filed by respondent for recovery of maintenance allowance after the petition No. 27/2003 filed under section 125 of Cr.P.C. was disposed of by the Family Court No.1, Pune, fixing the maintenance at the rate of Rs. 1,500/- per month to the wife and minor daughter Darshana. Since there were arrears amounting to Rs. 24,000/- for a period of 16 months, the warrant was issued to the applicant. The applicant expressed inability to pay any amount and showed willingness to suffer imprisonment. There was no other alternative left for the Family Court No.1, Pune, but to pass an order of sentence. The Family Court has also found that, to justify the non-payment, there is no plausible cause placed on record by husband and since the passing of the order u/s. 125, the respondent wife and her daughter have not received any benefits of the said order, the Family Court, ordered the applicant to undergo imprisonment for a period of 12 months, for committing default in paying arrears of 16 months and committed the applicant to jail. The warrant was accordingly directed to be implemented. The said order dated 22.07.2004 passed in PER NO. 444/2004 is under

challenge before this court.

2. The only challenge which has been raised by the learned counsel Mrs. Smita R. Kadu -Gawai for the Applicant, is that under section 125 (3) of the Cr.P.C., the Magistrate has powers to order imprisonment for default in payment of maintenance but the said powers, according to the learned counsel, are limited to only one month and therefore, the imprisonment awarded for a period of 12 months by the Family Court is not justifiable and therefore, the impugned order shall be set aside. In support of the contentions raised by the learned counsel for the applicant, the learned counsel has relied upon two judgments namely, **1999 (3) Mh. L.J. Pg. 290** in the matter of **Shahada Khatoon & Ors. vs. Amjad Ali & Ors.** and secondly, **I (2004) DMC 693 (DB) of the Andhra Pradesh High Court** in the matter of **Abdul Gafaoor @ Ashan vs. Hameema Khatoon & Ors.**

3. So far as the enforcement of the orders passed under section 125 of Cr.P.C. is concerned, the provisions of sub-section (3) of Section 125 and Section 128 are relevant. For the decision of this matter, section 125(3) is the only relevant provision

which provides for sentencing a person, committing default in payment of maintenance, to imprisonment. The relevant sub- section of the said section reads thus :-

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> (3). If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's (allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be) remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made".
>
> Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

The Criminal Procedure Code of 1898 also contains the

Chapter 36 about the Maintenance of wives and children and Section 488 sub- section (3) provides for enforcement of the order. The relevant provision of section 488 (3) of the 1898 Code is as under :-

"(1) ------

(2) ------

(3) If any person so ordered (fails without sufficient cause) to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

From the plain reading of these two provisions, it will be crystal clear that the provisions of section 125(3) of the Criminal Procedure Code of 1973 and section 488 (3) of Criminal Procedure Code, 1898 are pari materia same. Both these sections thus contemplate that if a person ordered to pay maintenance fails, without sufficient cause, to comply with the order, for every breach of the order, the Magistrate may issue a warrant for levying the amount due and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. Thus, for a default of whole or any part of the maintenance allowance remained unpaid, the imprisonment for a term extending upto one month or until payment, which ever is earlier, can be imposed by the Magistrate. In view of the proviso, the wives or children who are eligible for recovery of any amount of maintenance, may file such an application within a period of one year from the date on which it has become due. Thus in one application, for enforcement of the order under section 125, a maximum due amount can be claimed is of the 12 months and if

the proviso is read conjointly with the main sub-section (3), it becomes clear that for default of the whole or any part of each month's maintenance allowance, a sentence of one month imprisonment can be imposed by the Magistrate and thereby, the total imprisonment may extend upto a period of 12 months. The question as to whether the imprisonment for a period, more than one month can be granted or not was considered by this court in the matter of **Karson Ramji Chawda vs. The State of Bombay,** reported in **AIR 1958 BOMBAY 99.** It is a full bench judgment. The relevant observations in the said judgment read thus :-

> " Therefore, if we read the provision with regard to the power of the Magistrate to sentence the applicant independently of the power to issue the warrant, it is clear that the power to sentence is for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment, if sooner made. Now these words clearly lay down the power of the Magistrate. The power of the Magistrate is in respect of whole or any part of each month's allowance remaining unpaid to sentence the applicant for a term not exceeding one month".

4. Full bench of the Allahabad High Court had also the opportunity to consider the scope of section

488 (3) of Cr.P.C., 1898 in the matter of **Emperor vs. Beni,** reported in **39- Cr.L.J. 1938 Allahabad High Court- pg. 720;** Where the punishment was granted by the Magistrate for a period of six months by issuing one warrant for recovery of the maintenance of the amount of 21 months. It is observed by the Full Bench of the Allahabad High Court that :-

> "We are satisfied after a consideration of the terms of the section that the intention of the Legislature was to empower the Magistrate after execution of one warrant only to sentence a person, who has defaulted in the payment of maintenance ordered under S. 488, Criminal Procedure Code, to imprisonment for a period of one month in respect of each month's default and that the section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. In other words, where arrears have been allowed to accumulate, the Court can issue one warrant and impose a cumulative sentence of imprisonment".

It was further observed that -

> "We would remark further that the warrant of imprisonment under section 488 of the Criminal Procedure Code, the Form of which is to be found in Sch. V, No. XL, contemplates a sentence of more than one month's rigorous imprisonment in the case of a person who has defaulted in payment for more than one month. The warrant runs :
>
> "..... and whereas it has been further proved that the said (name) in wilful disregard of the said order has failed to pay rupees..... being the amount of the allowance

> for the month (or months) of ..... And thereupon an order was made adjudging him to undergo simple (or rigorous) imprisonment in the said jail for the period of ..... " .

5. In a case reported in **1991 CRI. L.J. 1098** in the matter of **Ram Bilas vs. Smt. Bhagwati Devi,** the Allahabad High Court held, relying upon the Full Bench judgment in the case of **Emperor vs. Beni (supra)**; that on default in payment of maintenance for several months by the husband, he can be awarded imprisonment for more than one month. It cannot be said that imprisonment for more than one month cannot be awarded even if maintenance may have been due for more than one month.

6. In the light of the above referred cases, it is to be noted that, as observed earlier, the language of sub- section 3 of section 488, quoted above and the language of section 125 (3) of Cr.P.C., 1973 is pari materia the same. The form of warrant to be issued under section 125 is provided in Schedule II of the Criminal Procedure Code, 1973. It is form No.18. In the said form also it is provided that :-

> "..... ;and whereas it has been further

> proved that the said (name) in wilful disregard of the said order has failed to pay rupees .....being the amount of allowance for the month (or months) of ..... And thereupon an order was made adjudging him to undergo imprisonment in the said Jail for the period of .....".

The language of that of form of warrant under the old Code and the form of warrant under new Code is one and the same, without making any substantial change.

7. The reference made by the learned counsel for the Applicant to the observations made by the Supreme Court in **1999 (3) Mh. L.J. Pg 290** in the matter of **Shahada Khatoon v/s. Amjad Ali,** requires consideration since it is the judgement of the Apex Court. The Apex Court held that u/s. 125 (3) of Cr.P.C., the Magistrate cannot order imprisonment for more than one month. It is to be noted that the Apex Court has made the said observations in order to answer the argument advanced by the learned counsel on behalf of the Appellants in that case. The argument advanced in that matter on behalf of the appellants was - *"liability of the husband arising out of an order passed under section 125 to make payment of maintenance is a continuing one and on account of*

non-payment there has been a breach of the order and therefore, the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made". This argument suggests that the power of the Magistrate to sentence the person, making default in payment of maintenance, is such that Magistrate can keep or sentence the person until the said person makes up the payment. It will thereby lead to further inference that if the person continues to commit default, he cannot be allowed to go out of jail unless the amount is paid inspite of fact that he has undergone sentence imposed, extending to one month. However, such is not the language of section 125(3). Section 125(3) contemplates a punishment of imprisonment which may extend to one month or until payment, if sooner made, for the whole or any part of each months allowance remaining unpaid. This means that for one month’s default, the Magistrate can straightway impose imprisonment extending upto one month and if the payment of maintenance is made during the period of sentence, the person will be released. Therefore, the Apex court has observed that if the man is kept in jail till the payment is made then such imprisonment may extend for a period of one month, which follows the language of section 125(3) and then

the observations of the apex court are appearing in the backdrop of the argument advanced by the appellants in the said case. Therefore, we find that the case referred by the learned counsel for applicant is not applicable to the facts and circumstances of the case involved in the present revision petition.

8. The learned counsel for the Applicant has also relied upon **-I (2004) DMC 693 (DB)** in the matter of **Abdul Gafoor @ Ashan vs. Hameema Khatoon & Ors.,** the case decided by the Andhra Pradesh High Court. It is to be noted that the reference was made to the Division Bench by the single Judge, as the single Judge of the said High Court found cleavage of opinion with regard to interpretation of sub-section (3) of section 125 of the Code of Criminal Procedure. The short question was as to what is the period for which a person can be detained in terms of Section 125(3) of the Code if he fails to pay the maintenance even after a warrant in terms of Section 125(3) of the Code, is issued. One of the learned single Judges took notice of the judgment of that court reported in **I (1994) DMC 224 (SC),** in which it has been held that detention can be for any period till the payment is made. Another

judgment which the learned single Judge noted, was reported in **P. Brahmaiah vs. P. Padma 1990 (1) ALT 370,** in which it has been held that the detention could in no case be more than 12 months.

9. However, we have noted that the controversy involved for the said reference has been decided by the Apex Court in the case of **Shahada Khatoon vs. Amjad Ali,** referred to above. Since we have distinguished the judgement of Shahad Khatoon vs. Amjad Ali, taking into consideration facts of the present case and also by making reference to the language of section 125(3) and the proviso referred thereto and also from form of warrant provided under Schedule- II in Form No. 18, we record our finding that the Magistrate can impose a punishment for default of each month or a part of each month's default in payment of maintenance, by awarding imprisonment for a period of one month or till the payment is made, which ever is sooner. If there are arrears for more than one month then the imprisonment exceeding for a period of one month can be imposed. However, what we find that the proviso contemplates application within 12 months and thereby at the most,

in one application 12 defaults can be clubbed together and after every 12 defaults, a separate application will have to be filed. However, in that eventuality in each application, as there are maximum 12 defaults, the Magistrate may impose imprisonment extending upto a period of 12 months, but that is outer limit. The lesser imprisonment can be imposed and such imprisonment will be followed until the payment is made, that means, if the amount is paid during the period of imprisonment, the person will have to be released immediately. In short, we find that there is no substance in this revision petition and the revision petition is accordingly rejected.

10. In view of the rejection of the petition, the civil application No. 5682/2004 also does not survive and the same is accordingly disposed of.

(D.B.BHOSALE,J) (S.B.MHASE, J)

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